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Supreme Court of the United States

OCTOBER TERM, 1946

7499 58
Supr. Ct.

Nos. 391-392-393

SAMUEL OKIN, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	Case No. 1 Case No. 2 Case No. 3

CONSOLIDATED PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Supreme Court of the United States

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SAMUEL OKIN, Petitioner, v. SECURITIES AND EXCHANGE COMMISSION, Respondent.	Case No. 1 Case No. 2 Case No. 3

CONSOLIDATED PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

SAMUEL OKIN prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the three orders of that Court entered in the above entitled causes on March 28th, 1946 affirming three orders of the Securities and Exchange Commission, all pertaining to Electric Bond and Share Company and American & Foreign Power Company, Inc. The order in case No. 1 affirmed the order of the Securities and Exchange Commission (hereinafter referred to as "the Commission") dated the 22nd day of January, 1944; the order in case No. 2 affirmed the order of the Commission dated April 25th, 1945 and the

order in case No. 3 affirmed the order of the Commission dated August 17th, 1945. The petitioner as an aggrieved person, pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. section 79x(a)) filed three petitions to review and set aside certain provisions contained in the said orders of the Commission, and for orders directing the adducing of testimony before the Commission. This Court heretofore affirmed the statutory authority of the petitioner to seek review of the basic order dated January 22, 1944 under said Section 24(a) of the Public Utility Holding Company Act of 1935 (*Securities and Exchange Commission* v. *Okin*, 325 U. S. 385, 392).

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. sec. 79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. sec. 347(a)). The orders of the Court below affirming the said orders of the Commission were entered on March 28th, 1946 (R. 104, 184, 254). On June 21st, 1946, Mr. Justice Black, on cause shown, made an order extending to August 12th, 1946, the period during which petitions for writs of certiorari might be filed with respect to the said orders of the Court below (R. 268).

The Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on March 2, 1946 and is reported at 154 F. (2d) 27.

The opinion of the Securities and Exchange Commission rendered January 22, 1944, and the orders of the

Commission dated January 22, 1944, April 25, 1945 and August 17, 1945, have not yet been officially reported. The said orders of the Commission are attached as Appendix A, B and C to the Brief annexed hereto.

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. sec. 79 *et seq.*), hereinafter referred to as the "Act". The portions of that Act which are directly involved are Sections 1(c), 3(a), 7(c), 11(b)(2), 11(e), 12(c), 18(f), 24(a), 25, 26(c), 29 and other sections which are attached as Appendix D to the Brief hereto annexed.

Statement

Petitioner owns 9,000 shares of the common stock of Electric Bond and Share Company (hereinafter referred to as "Bond and Share") and as such is one of the largest individual stockholders of record. Said stock has a present market value of approximately $210,000 and a net asset value of approximately $450,000.

The basic order of the Commission dated January 22, 1944, approved the joint application of American & Foreign Power Company, Inc. (hereinafter referred to as "Foreign Power") and Bond and Share for the reduction and extension of an indebtedness of $35,000,000 then owing by Foreign Power to Bond and Share by a payment of $5,000,000 in cash and the issuance of 3% serial notes of Foreign Power aggregating $30,000,000 principal amount and with maturities as follows: January 22, 1945, $3,000,000; January 22, 1946, $3,000,000; January 22, 1947, $3,000,000; January 22, 1948, $3,000,000; January 22, 1949, $18,000,000.

The said debt of $35,000,000 arose out of a cash loan of $30,000,000 made by Bond and Share to Foreign Power in 1931 and a further cash loan of $5,000,000 made in 1932.

The basic order dated January 22, 1944 contained provisions referred to therein as "conditions" enjoining, under certain circumstances, the payment of any of said notes aggregating $30,000,000 unless the Commission approved said payment. The Commission order dated April 25, 1945, extended to July 22, 1945, upon the same so-called "conditions", the maturity of the first note of $3,000,000 due on January 22, 1945; and the order dated August 17, 1945 further extended to January 22, 1946, upon the same alleged "conditions", the maturity of the said first note.

It is undisputed that Foreign Power does not and has never operated any public utility system in the United States and does not and has never derived any income whatsoever from the operation of any public utility company in the United States. It is a holding company which owns the stock of 103 companies of which 74 are gas and electric public utility companies operating in Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, India, Mexico, Panama, Venezuela and China.

In the Court below, petitioner contended:

1. That the so-called "conditions" in the said Commission orders were in effect and actually constituted injunctions restraining the payment of the said debt of $30,000,000 or any part thereof and that the Commission has no statutory power or authority to issue injunctions under the Act.

2. That said orders violate the mandate contained in Section 26(c) of the Act wherein it is specifically directed that "Nothing in this title shall be construed (1) to affect the validity of any loan or ex-

tension of credit (or extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, * * * or (2) to afford a defense to the collection of any debt or obligation * * *".

3. The Act was never intended to empower the Commission to regulate the affairs of Foreign Power which does not and has never operated directly or indirectly any public utility in the United States, and whose income is and has always been derived solely from subsidiary companies operating in the aforesaid foreign countries.

The factual undisputed history of this loan is briefly as follows:

Up to and including 1930 the said Foreign Power had engaged in an active campaign of purchasing securities of various public utility operating companies in the said foreign countries and in that respect invested upwards of $500,000,000; a very substantial part of which was raised by the sale of securities. Prior to 1930 Bond and Share invested over $227,000,000 in the securities of Foreign Power of which about $190,000,000 represented cash and the balance the cash cost of securities which Bond and Share transferred to Foreign Power.

In October, 1930, Foreign Power sold a $50,000,000 5% bond issue due 2020 and borrowed $50,000,000 from various banks in New York and elsewhere on an unsecured basis for a period of two years.

In January, 1931 Foreign Power borrowed from Bond and Share the aforesaid cash sum of $30,000,000 for the purpose of paying for said previously acquired properties in said foreign countries and to meet the cost of property additions therein as well as for other corporate purposes. On April 15, 1932, Bond and Share loaned the said fur-

ther cash sum of $5,000,000 to Foreign Power to provide the latter with working capital and to take care of other business necessities.

Prior to the maturity of the bank loans of $50,000,000 in 1932, certain agreements were reached with the various banks whereby the said loans were renewed on the condition, among other things, that Foreign Power's indebtedness to Bond and Share, then in the amount of $35,000,000, be subordinated to said bank loans and to the said $50,000,000 in bonds until the said bank loans were repaid. Accordingly, on April 15th, 1932, Foreign Power delivered to Bond and Share its note for $35,000,000 bearing 7% interest, which simultaneously was subordinated, as aforesaid.

Bond and Share in 1935 also purchased a 20% interest in the said bank loans at a cash cost of $10,000,000 in order to enable Foreign Power to obtain a further renewal of said bank loans. Thereafter Foreign Power kept making payments on the said bank loans of $50,000,000 until the same were entirely paid on February 14, 1943, and during the years 1933 to 1935, Foreign Power kept delivering to Bond and Share several renewal notes for the said sum of $35,000,000, all bearing 7% interest, the last renewal note being made on February 15, 1935 whose maturity date was February 15, 1938. The said $35,000,000 note became past due on February 14, 1943, when the balance of said bank loans of $50,000,000 were repaid, and said note then was considered as only bearing 6% interest.

Shortly after February 14, 1943, when Foreign Power found that it could not obtain from Bond and Share a further reduction in the interest rate from 6% because 6% was the cost of the said money to Bond and Share, Foreign Power arranged to borrow $30,000,000 from the same banks which had previously made it the loans of $50,000,000, repayable over a period of five years at the

rate of $3,000,000 during each of the first four years and $18,000,000 in the fifth year at an interest rate not to exceed 3%.

Foreign Power, pursuant to the resolution of its board of directors, on September 14, 1943 filed with the Securities and Exchange Commission its declaration wherein it stated its intention to repay to Bond and Share the said sum of $35,000,000 by using $5,000,000 of its treasury cash and borrowing the said sum of $30,000,000 from the said banks, as aforesaid.

Prior to the filing of the said declaration in September, 1943, the Securities and Exchange Commission had repeatedly expressed in its releases, its intention to indulge in a protracted investigation with respect to the said $35,000,000 owing by Foreign Power to Bond and Share and the various stock securities owned by Bond and Share in Foreign Power, representing a cash cost of approximately $227,000,000, as aforesaid, upon the greater portion of which Bond and Share had not received any return whatsoever for many years. It was these repeated inferences appearing in the said Commission releases which caused the instigation of stockholders' actions against Bond and Share in the New York Supreme Court, the principal cause of action as to excess interest having heretofore been dismissed (267 App. Div. 892).

When on September 14, 1943, Foreign Power filed the said declaration to repay the said $35,000,000 to Bond and Share, its secretary was very secretly informed by certain representatives of the Commission as to the consequences if Foreign Power persisted in proceeding with said plan of repayment of said $35,000,000 to Bond and Share. These very secretive threats were thereafter repeated by Commission members and its staff to the president of Foreign Power, who transmitted same to the officers and directors of Bond and Share, and these Commission activities thereafter resulted in the filing of the

amendment to the said declaration of Foreign Power wherein instead of repaying the entire sum of $35,000,000, only $5,000,000 was to be paid and Bond and Share, which had not been earning its dividends on its own preferred stock and had just previously very persistently refused to reduce the rate of interest, suddenly agreed to reduce interest on $30,000,000 from 6% to 3% and at the same time agreed to accept new notes for $30,000,000 payable in five years in the same amounts that the banks had agreed to accept as loans from Foreign Power.

The threats and duress brought to bear upon the officers and directors of Bond and Share and Foreign Power, resulting in the filing of the aforesaid new detrimental plan, are not in the record because of the refusal of the Commission to permit questions propounded by petitioner to witnesses on the hearing as to said matters to be answered, and it is this testimony which the petitioner in his petition in the Court below requested said Court to direct to be adduced before the Commission as authorized by said section 24(a) of the Act.

The Commission in its order not only approved the said new proposal concocted in the office of the Commission to the detriment of Bond and Share and its stockholders, but very carefully inserted into its order injunctive provisions of the most drastic type which only a Court of most general jurisdiction could ever grant, and in that manner the Commission without the slightest authority in law, has in no uncertain language forbidden the payment of any portion of the said $30,000,000 debt, irrespective of whether the same became due, unless with the permission of the Commission. The said unlawful provisions in the said Commission's order of January 22, 1944, are as follows:

> (1) The approval herein contained is subject to the express condition and reservation that the authorization by the Commission of the transactions

herein proposed shall in no way serve to affect the rank or status, legal or equitable, of the debt claim of Bond and Share against Foreign Power heretofore represented by the notes to be retired and hereafter to be represented by the notes to be issued by Foreign Power to Bond and Share hereunder, or the existing jurisdiction of the Commission with respect to the said debt claim, in connection with any future reorganization of Foreign Power or any other matter in which said rank or status would be pertinent;

(2) All agreements, conditions and reservations of jurisdiction heretofore imposed, made or entered into shall continue in effect and shall in no sense be deemed to have been waived, terminated or exercised by the action taken herein or hereunder; and

(3) If final determination of such rank and status and the propriety of payment of such notes has not been made prior to the date of maturity of any one or more of said notes, no payment shall be made or received on or with respect to the principal of any said notes at maturity or otherwise, except pursuant to permission of the Commission and until such permission is given, interest on said note proposed to be paid shall not be accrued, paid or charged at a rate in excess of 3% per annum unless the Commission by order shall have permitted a higher rate of interest; and failure to make any such payment of principal prior to permission of the Commission to make such payment shall not serve to accelerate the maturity of any of said notes not otherwise matured by their terms.

Petitioner filed his petition in the Court below to review the said order of the Commission dated January 22, 1944, as authorized by Section 24(a) of the Act.

On or about January 22, 1944, Bond and Share delivered to Foreign Power the latter's note to the former

in the sum of $35,000,000 dated the 14th day of February, 1935, which became due on November 15, 1938 and bore interest at the rate of 7%, the payment of which however was suspended until February 14, 1943, pending the payment by Foreign Power to the said banks of its loan aggregating $50,000,000, as aforesaid; and at the same time Foreign Power paid to Bond and Share $5,000,000 on account of said $35,000,000 anad delivered to Bond and Share the following notes of Foreign Power aggregating $30,000,000, all bearing interest at 3% and in the principal amounts and maturity dates, as follows: $3,000,000 on January 22, 1945; $3,000,000 on January 22, 1946; $3,000,000 on January 22, 1947; $3,000,000 on January 22, 1948; and $18,000,000 on January 22, 1949.

When the first serial note in the sum of $3,000,000 matured on January 22, 1945, the same was not paid by Foreign Power, but shortly prior to April 5th, 1945, Foreign Power and Bond and Share filed a declaration with the Commission with respect to said note, and on April 25th, 1945, the Commission, without holding any hearing under the Act although the same was demanded by petitioner, made its order dated April 25, 1945 (Appendix B) which contained the following:

> "The Commission, on January 22, 1944, issued its Order in the above-entitled matter (Holding Company Act Release No. 4855) among other things permitting the issuance by Foreign Power to Bond and Share of $30,000,000 of 3% Serial Notes consisting of four of such notes in the principal amount of $3,000,000 each, the first of which was payable on January 22, 1945 and the others of which are successively payable annually, and a fifth note in the amount of $18,000,000 maturing at the end of five years.
>
> The said Order contained a condition prohibiting any payments by Foreign Power to Bond and Share

with respect to the principal of any of said 3% Serial Notes at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission.

There is presently pending a Section 11(e) Plan filed by Foreign Power and Bond and Share under which Foreign Power's security structure is proposed to be reorganized and all of the securities therein held by Bond and Share are to be surrendered in exchange for new securities of Foreign Power and cash and the discharge of the various claims which have been or might be asserted on behalf of Foreign Power against Bond and Share, including such claim with respect to the rank and status of the 3% Serial Notes, and accordingly the amendment states that no application has been made for permission to pay the $3,000,000 note due January 22, 1945 or to determine its rank and status.

A Notice of Filing was issued on April 5, 1945 with respect to the amendment, in the form and manner prescribed by Rule U-23 under said Act and a request for a hearing was received by the Commission from one Samuel Okin, holder of nine thousand shares of the common stock of Electric Bond and Share Company. Okin had previously participated in this proceeding.

It appears that no new issues of substance (other than the extension of the maturity date of the note due January 22, 1945) not already determined by our Order of January 22, 1944 have been raised by either the amendment or the petition. No other person or persons have requested a hearing.

The Commission having considered said amendment and said petition and deeming a hearing unnecessary to the public interest and the interest of consumers and investors; and the Commission find-

ing that the requirements of the applicable provisions of the Act and the Rules thereunder are satisfied, and deeming it appropriate in the public interest to permit said declaration to become effective;

IT IS HEREBY ORDERED pursuant to Rule U-23 and the applicable provisions of said Act, and subject to the terms and conditions prescribed in Rule U-24, that the aforesaid amendment be, and the same hereby is, permitted to become effective forthwith."

Petitioner filed his petition in the Court below to review the said Order of the Commission dated April 25th, 1945, as authorized by Section 24(a) of the Act.

In the meantime, on or about March, 1945, hearings with respect to said Section 11(e) plan of Foreign Power, referred to in the aforesaid Commission Order dated April 25, 1945, were closed subject to call of the Trial Examiner; no further hearings were held until April 15th, 1946, when the hearings were reconvened at the request of a holder of second preferred stock of Foreign Power and again closed on July 8, 1946, subject to the call of the Trial Examiner. No decision has been rendered to date by the Commission with respect to said plan.

Upon the expiration of the said six months extension of the maturity date of the said first serial note of $3,000,000, namely, July 22, 1945, the said note was not paid although Foreign Power had the funds to pay same; and again, shortly prior to July 27th, 1945, Foreign Power and Bond and Share filed a declaration with the Commission with respect to said note, and the Commission, without holding any hearing although the same was again demanded by petitioner, made the order dated August 17, 1945 (Appendix C) containing the following:

"The Commission, on January 22, 1944, issued its Order in the above-entitled matter (Holding Com-

pany Act Release 4855) among other things permitting the issuance by Foreign Power to Bond and Share of $30,000,000 of 3% Serial Notes consisting of four of such notes in the principal amount of $4,000,000 each, the first of which was payable on January 22, 1945 and the others of which are successively payable in the three succeeding years, and a note in the amount of $18,000,000 maturing at the end of five years.

The said Order contained a condition prohibiting any payments by Foreign Power to Bond and Share with respect to the principal of any of said 3% Serial Notes at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission.

The Commission, on April 25, 1945, issued its further Order in the above-entitled matter (Holding Company Act Release No. 5757) permitting Foreign Power and Bond and Share to enter into an agreement to extend the maturity of the $3,000,000 Serial Note payable January 22, 1945 to July 22, 1945, all other terms and conditions of said note remaining unchanged, and said agreement was entered into by Foreign Power and Bond and Share pursuant to said Order.

Foreign Power has filed with the Commission under Section 11(e) of the Public Utility Holding Company Act of 1935, a Plan joined in by Bond and Share, for the reorganization of Foreign Power (File No. 54-111, Holding Company Act Release No. 5388) and said Plan proposes among other things that the 3% Serial Notes in the principal amount of $30,000,000 together with other securities of Foreign Power held by Bond and Share be surrendered to Foreign Power for the considerations, among others, of the receipt by Bond and Share of cash, debentures and common

stock of Foreign Power. Said Plan is pending and this Commission has not given its permission to any payment by Foreign Power or any receipt by Bond and Share with respect to the principal of said serial note due originally on January 22, 1945.

Declarants request that the Commission's Order on the present declaration be entered at as early a date as possible.

The present declaration was filed on the 21st day of July, 1945, a notice of the said filing was issued on the 27th day of July, 1945 and notice of said filing was given in the form and manner prescribed by Rule U-23 promulgated pursuant to said Act. A request for a hearing was received by the Commission from one, Samuel Okin, a holder of 9,000 shares of common stock of Bond and Share. Okin had participated in the original proceeding which eventuated in the issue of said Order of January 22, 1944. No other person or persons have requested a hearing.

It appears that no new issues of substance (other than the extension of the maturity date of the note due originally on January 22, 1945) not already determined by said Orders of January 22, 1944 and April 25, 1945 have been raised either by the present declaration or by Okin's petition for a hearing.

The Commission having considered said declaration and said petition and deeming a hearing unnecessary to the public interest and the interests of consumers and investors; and the Commission finding that the requirements of the applicable provisions of the Act and the Rules thereunder are satisfied and deeming it appropriate in the public interest that said declaration be permitted to become effective and that the effective date thereof be advanced;

IT IS HEREBY ORDERED pursuant to said Rule U-23 and the applicable provisions of said Act, and subject

to the terms and conditions prescribed in Rule U-24, that the aforesaid declaration be, and the same hereby is, permitted to become effective forthwith."

Petitioner filed his petition in the Court below to review the said order of the Commission dated August 17th, 1945, as authorized by Section 24(a) of the Act.

On January 22, 1946, the first serial note of $3,000,000 which already had been extended for two successive six month periods from its prior maturity dates, as aforesaid, again became due and payable, in addition to the second serial note in the sum of $3,000,000 which had as its original maturity date, January 22, 1946. No part of said sum of $6,000,000 was paid by Foreign Power to Bond and Share although Foreign Power has the funds to pay same. By the terms of said serial notes delivered by Foreign Power to Bond and Share in January, 1944, the failure to pay any one serial note at the option of Bond and Share accelerates the maturity of the remaining notes not otherwise matured by their terms.

The Commission's order dated January 22, 1944, not only prohibits any payment by Foreign Power to Bond and Share with respect to the principal of any of said 3% notes aggregating $30,000,000, at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission; but in addition enjoins the automatic operation of the aforesaid acceleration clause in the event of the failure to make payment of any one note.

The Commission has not modified the aforesaid provisions of its said order of January 22, 1944 and the provisions thereof have been incorporated by reference into the Commission's orders dated April 25, 1945 and August 17, 1945.

The Section 11(e) plan of Foreign Power, used as an excuse for the two six months extensions of the first serial note of $3,000,000, as aforesaid, has not been the subject of any determination by the Commission although the plan was filed more than a year and a half ago.

The said three orders of the Commission, under review herein, unlawfully prohibit Bond and Share from collecting $30,000,000 lawfully owing to it by Foreign Power, and unlawfully prohibit the latter company from paying said sum; and said three orders unlawfully compel Bond and Share to retain in its portfolio a $30,000,000 asset at an interest rate of 3% which is causing a very substantial loss to Bond and Share and its stockholders, and has already caused a loss of millions of dollars since the cost of said money to Bond and Share is and has been 6%. Furthermore, except for the aforesaid unlawful prohibitions contained in said three Commission orders, under review herein, the said $30,000,000 could readily be collected by Bond and Share, either by payment thereof in whole or substantially, or by sale to banks of any unpaid notes; and it cannot be disputed that the said principal of $30,000,000 could far more advantageously be applied in further reduction of the outstanding $6 and $5 preferred stock of Bond and Share, the necessity for which the Commission recently recognized when on October 10, 1945, it authorized the payment by Bond and Share to its preferred stockholders of the sum of $31,298,400 in cash (Holding Company Act Release No. 6121).

The lower Court affirmed the three orders of the Commission (R. 104, 184, 256).

The Questions Presented

1. Do the Commission orders violate the Congressional mandate of Section 26(c) of the Act that "Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or extension

or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title,....., or (2) to afford a defense to the collection of any debt or obligation.....".

2. Do the so-called "conditions" in the Commission orders constitute injunctions and has the Commission the statutory power to issue injunction or restraining orders under the Act.

3. Does the Act empower or intend to authorize the Commission to regulate the affairs of Foreign Power which does not and has never operated directly or indirectly any public utility in the United States, and whose income is and has always been derived solely from subsidiary companies operating in Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, India, Mexico, Panama, Venezuela and China.

Specification of Errors to be Urged

The Circuit Court of Appeals for the Second Circuit erred in holding that the Commission orders do not violate the Congressional mandate of Section 26(c) of the Act; that the so-called "conditions" do not constitute injunctions and that the Commission had the power to incorporate such "conditions" in its orders; and that the Act empowers and intended to authorize the Commission to regulate the affairs of Foreign Power.

Reasons Relied On For Grant of Writs

(1) Whether the orders of the Commission directly violate the Congressional mandate in Section 26(c) of the Act, circumvent its provisions and unlawfully, directly and adversely substantially affect investors in contravention of the Act, is a question which seriously involves the administration of the Act, has not been but should be settled by this Court.

(2) The Court below in determining that the "conditions" are not injunctions and are authorized; that Section 26(c) has not been violated and that the Commission has jurisdiction to regulate the affairs of Foreign Power, misinterpreted the "conditions" and their unquestionable import and effect and misconstrued the provisions of the Act and their intent and purport, and the decision of the Court below is in conflict with the decisions of this Court.

(3) A real question of deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States is presented in the instant case, as the petitioner by the decision below is being deprived of substantial property by administrative orders without statutory authority.

WHEREFORE, for the reasons stated above and discussed more fully in the annexed brief, your petitioner prays that writs of certiorari be issued out of and under the seal of this honorable Court, directed to the United States Circuit Court of Appeals, Second Circuit, to the end that the above causes may be certified to and reviewed and determined by this Court, and that the judgments of said Circuit Court of Appeals in the above entitled causes may be reviewed by this Court and your petitioner prays for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

SAMUEL OKIN,
Attorney for Petitioner.

August 10th, 1946.

BRIEF IN SUPPORT OF PETITION

(For index, table of cases, table of statutes, reference to opinion below, jurisdictional statement, statement of the case and specification of error, reference is made to the petition.)

I. The Commission orders violate the Congressional mandate of Section 26(c) of the Act.

The Act is the master of the Commission and its mandates are as obligatory upon the Commission as upon others who come within its confines.

Congress, in no uncertain language, in Section 26(c) of the Act directed that "Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title * * *, or (2) to afford a defense to the collection of any debt or obligation * * *".

This specific limitation upon the application of the Act, subject to an "unless" clause therein, hereinafter referred to, and which in no way is applicable herein, should have completely exhorted the Commission to refrain from in any manner interfering with the collection of the debt of $30,000,000 owing by the said Foreign Power to Bond and Share, undisputedly arising from a cash loan of $30,000,000 in 1931, long prior to the enactment of the Act.

Congress, apparently realizing that the Act would be resorted to as an *excuse* not to pay debts and obligations owing to public utility companies who might register under the Act and be subject to its provisions, very prudently provided (sec. 26(c)) against any such use or

interpretation of the Act. The Commission, openly disregarding the expressed Congressional restraints placed upon the Act, has defiantly resorted to the most flagrant usurpation of power by assuming powers which Congress deliberately withheld from it and then unlawfully enjoining the collection of any part of the said sum of $30,000,000 owing to Bond and Share from Foreign Power, except with the permission of the Commission.

Such wilful violations by the Commission of the specific mandate of Congress should not be tolerated by this Court and the personal motives of the Commission and its staff, for the benefit of others, to undermine these lawful debts and obligations due Bond and Share, should not deter this Court from terminating this unlawful interference by the Commission with the collection of $30,000,000 due Bond and Share, a debt squarely protected by the Act from any unlawful meddling by the Commission.

Congress did not intend that the Act should in any manner be utilized by any one, including the Commission, to unlawfully divest investors of the securities and investments underlying their stock interests or to so undermine same as to destroy their value. To specifically prevent the use of the Act to afford any defense to the payment of debts and obligations, section 26, thereof, as originally passed by the Senate, was amended in the House, as a Committee amendment, on motion of its sponsor, Chairman Rayburn, so as to include therein the present subdivision (c) of said section 26.[1] The sanctity of this Congressional mandate and the limitation upon the application of the Act as incorporated in Section 26(c), should not only be heeded by the Courts but also protected against any unlawful invasion by the Commission.

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[1] 74th Cong. 1st Sess. p. 10567.

That Congress never intended by the Act to injure investors or their underlying securities, but on the contrary believed that the same would strengthen their investments, is best evidenced by the following colloquy between Senators Wheeler and Tydings:[2]

"Mr. Tydings: I am wondering what protection could be afforded by the bill in addition to that which now exists to insure equality in the redistribution of the holding-company capital structure.

Mr. Wheeler: Of course, it would have to be done under the supervision of the Securities Commission.

Mr. Tydings: We would really have to rely more on the Securities Commission then on the bill to make sure that an equitable distribution were made.

Mr. Wheeler: Exactly, and, as I shall point out in a few minutes, as a matter of fact any reorganization which takes place will be under the supervision of the Securities Commission, so as to assure the security holder that he is not going to be robbed in the reorganization as many of the security holders have been robbed in the reorganization of the railroad companies and other companies of that kind.

* * * * *

Mr. Wheeler: Even the unfairest critic would have to admit that there would be no danger of the sacrifice or wastage of the legitimate asset values of operating company securities behind the investors' holding-company securities, if the reorganization were carried out under the following conditions:

First: With plenty of time to get adequate values for any assets to be disposed of.

Second: With adequate legal machinery in any reorganization required by the bill for the read-

[2] 74th Cong. 1st Sess. pp. 4604, 4605, 4607.

justments of liens and the comparative rights of security holders to do equity to all.

Third: With complete supervision and control of plans of reorganization by a disinterested government commission to prevent the usual profiteering by reorganization managers, reorganization lawyers, reorganization bankers, and all the rest of the scalpers who have made corporate reorganizations in this country a nightmare for the average investor.

All the prophecies of destruction of the interests of the investors are based on a theory that reorganization and dissolution under section 11 will not be carried out under those conditions. But in proceedings under section 11 every one of the conditions is carefully provided for.

* * * * *

That brings me to the last point—the protection of the holding-company investor by the Securities and Exchange Commission. I do not blame the average investor for shuddering at the very word 'reorganization'. In the usual process of reorganization and regrouping of properties the investor might be given the same milking by reorganization bankers and their lawyers that he has had to take in railroads, real estate, and every other kind of corporate reorganization. To meet that very danger the bill puts the entire process of reorganization including fees and so-called 'reorganization plans', under the control of the Securities and Exchange Commission.

It also carefully requires the Federal courts to appoint the Securities and Exchange Commission itself trustee in any reorganization or dissolution proceeding. It does that to protect the investor by avoiding the jockeying for the selection, by a busy judge or from a neatly weighted panel, of

those individual trustees who will play ball with the right people. Such jockeying, every realistic lawyer and every realistic court knows, goes on, however subtly and secretively, in every bankruptcy, receivership, and reorganization proceeding.

There is no reason why, with all this protection given the investor, both the Securities and Exchange Commission under this section 11 and by the Federal courts, there should be any shrinkage in the actual value of the investors' interest in the operating companies. The individual investor really ought to come out of the reorganization with far better securities than those with which he went into it. He ought to get a security which represents an actual down-to-the rails investment in a regulated local operating company or, at most, a regulated regional holding company. He ought to get a security which will bring him, instead of a lot of paper-stock dividends, all the legitimate cash dividends the operating company can pay—not what is left of them after high salaries, large fees, big bonuses, to holding company officers and bankers, and the purchase of securities at exorbitant prices from corporate insiders.

In short, the individual investor ought to get the kind of security he thought he was buying in the first place. The benefits of this bill to the interests of the great middle class, who make up the bulk of American investors, will be incalculable. It will strike a real blow at the tyranny of that private socialism of a privileged few which threatens the whole future of independence of business and of the Nation itself."

The foregoing legislative history conclusively sustains petitioner's contentions that it was the belief of the Congressional sponsors of this Act, that the machinery which

had been incorporated for the reorganization of top holding companies which had been found to be evil, would adequately protect the investor against the nightmare which had theretofore confronted investors in other reorganization proceedings. Congress apparently cherished the hope that the Securities and Exchange Commission would not become biased and prejudiced and that it would not foster the interests of any particular class of investors against any other class. In any event, against any possible contingency which might unlawfully affect the interests of investors under the Act, Congress utilized the provisions of section 26(c) as a safeguard for the protection of the investor, whom it sought to protect from being robbed of his underlying securities.

The facts at bar best illustrate the situation which Congress must have had in mind when it provided for the limitation of the application of the Act in Section 26(c).

Recently this Court had occasion to consider another command of Congress incorporated in Title II of the *same* Public Utility Holding Company Act of 1935 (15 U. S. C. sec. 79 *et seq.*) pertaining to the jurisdiction of the Federal Power Commission, wherein this Court held:

> "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shalt not' is usually rendered as to forbid and we think here it is employed without subtlety or contortion and in its usual sense. If otherwise in doubt this provision should read in harmony with the policy provision. So read its terms seem plainly to state circumstances under which the Commission shall not have jurisdiction. As such it is the provision which loomed importantly in the minds and speech of its sponsors, perhaps was necessary to get the bill passed, and is one which the Commis-

sion must observe and the courts must enforce" (*Connecticut Light & Power Company* v. *Federal Power Commission*, 324 U. S. 515, 528).

Every argument and contention advanced by the Commission in the lower Court was intended solely to destroy the impact and limitation by Section 26(c) which Congress had placed upon the application of the Act and the jurisdiction of the Commission thereunder, and the efforts of the Commission in the Court below were aimed solely to support their endeavors to nullify this Congressional mandate, and it is submitted that the lower Court erred in sustaining the Commission.

The lower Court (R. 261-262) sustained the contentions of the Commission that construction of numerous sections of the Act and particularly sections 6(a), 7(d) and (f), and 12(c) and (f) support the Commission's power to make its said orders and held (R. 262-263):

> "The foregoing sections are broad enough in terms to empower the Commission in its order approving issuance of the renewal notes to impose conditions designed to preserve the status quo pending a later determination of the rank and status of the debt claim of Bond and Share against its subsidiary; and the purpose of the Act supports the same construction. Section 11 contemplates the simplification of holding-company systems and the effectuation thereof by the submission of a plan 'fair and equitable' to the persons affected by it. If the Commission lacked power to make orders such as those under review, its powers with respect to a fair and equitable plan under section 11 would be seriously circumscribed. Cf. *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 678.
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> The petitioner, however, contends that section 26(c) precludes the construction we have given to

the sections above discussed. Section 26 is entitled 'Validity of contracts.' Paragraph (a) deals with contracts to waive compliance with any provisions of the Act and declares them void; paragraph (b) deals with contracts made in violation of the Act or the performance of which involve a violation, and declares them void but saves the rights of innocent assignees. Paragraph (c) reads as follows:

> 'Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, or obligation, or lien.'

The petitioner argues that this is a direct mandate that no provision of the Act shall be construed (1) to affect the validity of any loan or renewal thereof, or (2) to afford a defense to the collection of any debt. As we shall show below this is not a correct interpretation of section 26(c). Even under the petitioner's interpretation we fail to see how the

orders on review would conflict with section 26(c) for they do not pass upon the validity of the original loan nor subordinate its collection to the rights of other security holders of Foreign Power. They merely postpone maturity of the renewal notes until those questions shall have been decided in another proceeding. What that decision will be is as yet unknown.

But the petitioner's interpretation completely disregards much of the language of paragraph (c). Thus, the clear implication of the 'unless' clause is that other provisions of the Act may be construed to affect the validity of the loan or renewal thereof, if at the time of making the loan or renewal the person making it shall have actual knowledge that the making is a violation of the Act or any rule or regulation thereunder. Similarly, other provisions of the Act may afford a defense to a person who did not acquire the debt in good faith for value and without knowledge of the violation of the Act. In short, we think section 26(c) saves the right of bona fide holders; it forbids a construction which will invalidate a loan or renewal thereof in the hands of a bona fide holder but not when held by one who had actual knowledge of the prohibitions of the Act, as for example, that sections 6 and 7 require the issuance of a renewal note to be authorized by the Commission."

Petitioner submits that the lower Court erred in concluding that Section 26(c) does not apply because the orders of the Commission do not "pass upon the validity of the original loan nor subordinate its collection to the rights of other security holders of Foreign Power." While subdivision (1) of said Section 26(c) forbids any construction of the Act which would "affect the validity of any loan * * * (or any extension or renewal there-

of * * *", subdivision (2) forbids any construction of the Act which would "afford a defense to the collection of any debt or obligation * * * by any person who shall have acquired such debt * * *" and consequently since the lower Court concedes that the orders "postpone maturity of the renewal notes until those questions shall have been decided in another proceeding," it must necessarily follow that the orders violate Section 26(c) in that they afford a defense to the collection of the debt of $30,000,000 owing by Foreign Power to Bond and Share and actually by their very terms prohibit the payment of any part of the said debt at maturity. It is impossible to conceive a more direct violation of the said Section.

The contention of the Commission, as sustained by the lower Court (R. 263) that "If the Commission lacked power to make orders such as those under review, its powers with respect to a fair and equitable plan under section 11 would be seriously circumscribed," merely further illustrates the conflict between what Congress has decreed in the Act and what the Commission and the lower Court believe Congress should have legislated. However, it is now very firmly established law that it is not the function of either the Court or administrative bodies to attempt to rewrite the legislation but that it is the duty of the Courts to enforce the same as written and it is the duty of administrative bodies to administer the same accordingly. Consequently it is wholly immaterial how meritorious or lacking in merit may be the said contention of the Commission as sustained and acquiesced in by the lower Court.

In any event the case of *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 678, cited by the lower Court (R. 263), it is respectfully submitted, is not in point, and wholly without any statutory premise in this case at bar. In the cited case the power of a bankruptcy

court to stay creditors involved in the bankruptcy proceedings, was sustained and was predicated both upon the provisions of the Bankruptcy Act and the Judicial Code which specifically grants such powers to the Bankruptcy Court in addition to its inherent power to protect its jurisdiction. Obviously the statutory and inherent power of a bankruptcy court is totally different from the statutory jurisdiction of the Commission, whose powers to administer the Act are solely confined to the Statute.

The further contention of the Commission as sustained by the lower Court (R. 265) that "To give section 26(c) the meaning petitioner ascribed to it would nullify the regulatory and reorganization powers conferred by other sections of the statute already discussed. Such an interpretation must be rejected" appears to be without any premise in the Act and totally disregards the specific mandate of Congress.

The cases cited by the lower Court (p. 265) do not support its conclusions. Those decisions[3] merely held that when outstanding bonds are called as a result of the impact of Section 11 of the Act, the bondholder is entitled only to the full principal unpaid on his debt and is *not* entitled to any premium for the accelerated payment. Such a construction predicated upon the impact of Section 11 does not conflict with the provisions of Section 26(c) since nowhere is the validity of the loans permitted to be attacked nor is any construction of the Act resorted to for the purpose of affording a defense to the collection of the debt and obligation. These decisions directed the payment of the debt and obligation in full without any premium, a far different situation from the

[3] *Community Gas & Power Company*, S. E. C., Holding Company Act Release No. 4395 (1943). *In re American Gas & Power Co.*, 55 F. Supp. 756, 759 (D. Del.); *In re Laclede Gas Light Co.*, 57 F. Supp. 997, 1010 (E. D. Mo.), aff'd sub. nom., *Mass. Mut. Life Ins. Co.* v. *S. E. C*, 151 F. 2d 424 (C. C. A. 8); *New York Trust Co.* v. *S. E. C.*, 131 F. 2d 274, (C. C. A. 2), cert. den. 318 U. S. 786.

prohibitions and restraints which the Commission's orders have created forbidding any payment of the outstanding debt and obligation.

The jurisdiction of the Commission under Section 11 of the Act, commonly referred to as the reorganization provisions of the Act, was never intended by Congress to empower the Commission to attempt to strip a holding company (such as Bond and Share) of its assets or to undermine the same for the purpose of enriching unjustly other statutory subsidiary companies and their stockholders under the guise of fictitious claims which are without any premise either in law or fact and which in any event have for many years been legally outlawed.

The power of the Commission to reorganize a holding company system under Section 11 of the Act to eliminate the evils at which the Act was avowedly aimed, does not in the slightest degree authorize the Commission to engage in an extended orgy at the expense of the investors in the top holding company and particularly its common stockholders, merely because the Commission has illegally adopted as its beneficiaries, the stockholders of subsidiary statutory companies, and particularly their preferred stockholders, for whom the Commission has carefully designed very substantial preferential wind-falls.

The activities of the Commission, aimed principally at the common stockholder of Bond and Share, have taken the form of attempting to undermine or strip said company of its valuable assets under guise of the Act or its unlawful interpretation. The Commission has failed and refused to enforce the mandate of Congress to eliminate Bond and Share, whose existence was one of the main reasons for the enactment of the Act, and whose continued existence unquestionably violates Section 11 of the Act. Instead, the Commission pursues a deliberate course to injure, financially, the investor of Bond and Share and

particularly its common stockholder, and in these respects has obtained both the active and passive cooperation of the management of the company reflecting their deliberate conclusion to intentionally acquiesce in such activities of the Commission and not to question its unlawful acts and orders, no matter how drastic and disastrous may be their effect on the common stockholder of the company.

It is appropriate at this point to refer to what this Court said in *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 24:

> "The action of the Commission finds no support in right principal or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rests—that this shall be a government of law—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning.
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> 'It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.'*
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> * * * * * *
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> Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bu-

reaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted to extend their powers by encroachments —even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties."

II. The Act does not empower the Commission to issue injunctions or restraining orders or to prohibit the payment and collection of a debt and obligation directly protected by Section 26(c) of the Act.

Congress entrusted under Section 18(f) of the Act the issuance of temporary and permanent injunctions to the Federal Courts and authorized the Commission to apply for and the said Courts to issue such injunctions upon a proper showing.

Nowhere in the Act is there the slightest statutory authority for the issuance of any injunctive decree or restraining order by the Commission. Yet, without a semblance of statutory sanction, the Commission has issued orders unquestionably permanently prohibiting the payment and collection of the said $30,000,000 or any part thereof, owing by Foreign Power to Bond and Share, as aforesaid, except with the approval of the Commission.

In this respect, the lower Court said:

"(2) The pettiioner's second point is grounded on the premise that the orders under review are in effect an injunction against payment of the debt, or any part thereof except the $5,000,000 payment authorized

by the basic order, until the Commission shall have ruled upon its 'rank and status'. The argument is that the Commission has no power to make an injunctive order, but must apply under Section 18(f) to a federal court to enjoin any acts or practices which will constitute a violation of the provisions of the Act. Assuming the argument to be sound, the premise on which it is based is faulty. The basic order contains no injunctive provision; it authorizes the debtor to issue renewal notes on certain conditions.[8] Both debtor and creditor accepted these conditions and the notes were delivered in conformity therewith. Should the debtor make any payment in violation of the terms of the order, its action would not be in contempt of any injunctive provision of the order. Whether it could be proceeded against under section 29 for a criminal offense is another question, but one which is irrelevant to the argument based on section 18(f)."

Petitioner submits that the lower Court erred in its aforesaid interpretations and conclusions. That the restraining provisions in the orders are referred to therein as "conditions" rather than injunctive or restraining provisions, is wholly immaterial. The substance of the provisions alone govern their legal aspect and the authority of the Commission to issue the same.

In this respect, it is important to note that the Commission in its subsequent orders dated April 25, 1945 and August 17, 1945, referred to the "conditions" in the basic order of January 22, 1944, as "prohibiting any payments by Foreign Power to Bond and Share with respect to the principal of any of said 3% Serial Notes at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission" (R. 123, 209).

The conclusion of the Court below that the Commission orders "prohibit" rather than "enjoin" the payment of the said debt of $30,000,000, or any part thereof, or that a violation thereof might constitute a criminal offense under section 29 of the Act rather than a criminal or civil contempt under section 18(f), thereof, really begs the underlying issue, to wit: Is there any statutory sanction whatsoever for the assertion by the Commission under the Act of injunctive or restraining orders with respect to any matter properly before it under the Act and particularly with respect to a $30,000,000 debt directly protected by the Act (sec. 26(c)).

Reference by the lower Court to the fact that "Both debtor and creditor accepted these conditions and the notes were delivered in conformity therewith" cannot in the most remote manner alter the legal significance of the so-called "conditions". The consummation of a transaction cannot create any degree of legality to any portion of the Commission order created without statutory authority. In any event, if Section 26(c) protects the said debt from any attack by the Commission, then the Commission would have been powerless to have prevented the extension of a matured obligation by the issuance of new notes bearing a lesser rate of interest.

It is the debt of $30,000,000, and not the notes which evidence the existence of the debt, that governs the legal aspects of this matter. Prior to the issuance of the new notes, the Commission possessed no statutory power whatsoever to interfere with the collection by Bond and Share of the said past due 7% note of Foreign Power in the sum of $35,000,000. Merely because the creditor and debtor agreed to extend the past due obligation by paying $5,000,000 on account thereof and having new 3% notes issued for the balance of $30,000,000, can under *no* circumstances be utilized by the Commission as a basis for interfering with a subsequent payment and collection

of the said sum of $30,000,000, which prior thereto it could not prevent. For any one to contend to the contrary would be a sad commentary since it would constitute a substantial penalty for the generosity of Bond and Share in agreeing to extend the payment of the said balance of $30,000,000 over a period of five (5) years at the reduced interest rate of only 3%. Any such contention that such extension and renewal creates powers in the Commission which prior thereto were wholly lacking, is obviously completely frivolous.

A further answer to the conclusion of the lower Court is found in the following reservation appearing in the joint amended declaration filed by Foreign Power and Bond and Share (R. 84):

> "Neither this statement nor the acceptance of or reliance upon any order, rule or regulation, or of any order or direction of the Securities and Exchange Commission, shall be deemed a waiver of any constitutional or legal right of the Companies or of any of their associate or affiliate companies, all of which are hereby expressly reserved. If this reservation and refusal to waive any constitutional or legal right shall be held invalid or inoperative by any court of competent jurisdiction, this Statement shall be deemed to have been void and of no effect from any date specified in written notice given to the Securities and Exchange Commission by or on behalf of the Companies."

When the basic order of January 22, 1944 was issued, it is obvious that its injunctive provisions were inserted because of an unlawful plan within the staff of the Commission to find some way of undermining the $30,000,000 debt and obligation of Foreign Power to Bond and Share in order to benefit other stockholders of Foreign Power. The scheme of the Commission's staff was not secretive

because prior thereto they had caused various releases to be issued by the Commission wherein without any statutory authority, statements were made intending to create questions as to the validity of this large debt due Bond and Share and that it would be undoubtedly attacked in Commission proceedings and thereby various stockholders' actions were instigated.

When the said basic order of January 22, 1944, was issued, no plan had been filed by Foreign Power under Section 11(e) of the Act. However, it is significant to note that in this proceeding, the Commission advanced the contention and the lower Court sustained the same, that the said objectionable "conditions" should now be sustained because subsequently there was filed an 11(e) plan wherein it is claimed there is involved alleged questions with respect to said debt of Foreign Power to Bond and Share.

Whether the Commission had the statutory power on January 22, 1944 to incorporate in its orders the said "conditions" can only be determined by the facts and law applicable thereto as existed at the time of the issuance of the said order. The conclusion of the Court below and its acceptance of the contentions of the Commission that its powers under section 11 with respect to a plan subsequently filed thereunder, should govern the interpretation of its said order, is contrary to law. Before passing this question, it is important to note that under section 11(e) of the Act, the only jurisdiction granted to the Commission is the power to determine whether a plan properly filed under said section 11(e) is "fair and equitable" to the persons affected by the plan and that such plan is necessary to effectuate the provisions of subsection (b) of section 11. If the Commission concludes that the plan is fair and equitable to the persons affected by such plan and is necessary to effectuate the provisions of subsection (b) of section 11, then the Act

authorizes the Commission to approve the plan. Upon the approval or disapproval of the plan, according to the statutory directions, the power of the Commission under section 11(e) is expended, and the attempt to contend that the Commission has the power to determine whether equitable principles may require the limitation or subordination of the said $30,000,000 debt owing to Bond and Share, to the alleged claims of public security holders of Foreign Power, is wholly without the slightest merit and void of any statutory sanction whatsoever. Any such Commission contention is purely a creature of imagination and not predicated upon the Act.

The contentions of the Commission that it possesses the statutory power to compel, if it sees fit, the limitation or subordination of the said $30,000,000 owing to Bond and Share, is the root of all the difficulties confronting Bond and Share investors in this matter, and it is respectfully asked that this Court terminate such fallacious and illegal theories.

III. The Act was never intended to authorize the Commission to regulate a holding company such as Foreign Power whose utility interests are solely confined to foreign countries.

It is undisputed that Foreign Power does not operate, directly or indirectly, any utility company in the United States or in any of the Territories or in any place subject to the jurisdiction of the United States. Its income from utility operations is derived solely from subsidiary operating companies located in Central and South America, China and India.

Upon these undisputed facts, the lower Court has upheld the contention of the Commission that the Act empowers it to regulate the affairs of Foreign Power and that it possessed a discretionary power under 3(a)(5) of

the Act to determine the extent to which it can grant an exemption to Foreign Power under the Act. Petitioner submits that the conclusions of the lower Court are in error and that no such discretion exists.

With full knowledge of its constitutional limitations, Congress in enacting the Public Utility Holding Company Act of 1935 specifically provided and intended thereby only to concern itself with holding companies and their subsidiaries which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce (1(c)). The Act was never intended by Congress to foster the interests, merely, of security holders of companies engaged in business in foreign countries.

The underlying policy of the Act, as carefully outlined in section 1(c) thereof, was to reach the holding company which controlled the public-utility systems engaged in interstate commerce or in activities which directly affect or burden interstate commerce. Thus the Act provides (1(c)):

> "When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon

as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

The evils which are enumerated in the aforesaid section 1 of the Act and which the Act sought to eliminate are those connected with holding company systems in the United States or in territories subject to the jurisdiction of the United States or of any place subject to the jurisdiction of the United States.

While various provisions of the Act other than section 11, seek to authorize the Commission in certain respects to regulate the affairs of holding companies and their subsidiaries engaged in interstate commerce or in activities which constitute a burden upon interstate commerce, the fact remains that it is section 11 which constitutes the principal provisions of the Act. It is the simplification, integration and when necessary the dissolution of holding company systems, that the Act primarily was aimed at, and it was the abuses which are connected with such systems that Congress was concerned with.

Holding companies which confine their operations solely to that of foreign countries, which operating utilities do not even enter into any contiguous state in the United States, was certainly never the problem of Congress and was never intended by Congress to be the subject of regulation under the Act through the Commission.

Petitioner respectfully submits that the determination of the lower Court on this phase of the case at bar, obviously conflicts and is contrary to the recent decision of this Court in *North American Company* v. *Securities and Exchange Commission,* U. S. , 66 Sup. Ct. Rep. 785, where this Court held (p. 793):

"By making these enumerated interstate transactions unlawful unless the holding company registers with

the Commission and by extending section 11(b)(1) to registered holding companies, Congress has effectively applied section 11(b)(1) to those holding companies that are in fact in the stream of interstate activity and that affect commerce in more states than one. Congress has further declared in section 1(c) that all the provisions of the Act, thus including section 11(b)(1), shall be interpreted to meet the problems and remove the evils connected with public utility holding companies 'which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce.' Section 11(b)(1) is thus clearly and unmistakably applicable to holding companies engaged in interstate commerce.

Not all holding companies that are engaged in interstate activities, however, must necessarily comply with section 11(b)(1). By the terms of section 3(a)(1), if a holding company and all of its subsidiaries are predominantly intrastate, in character and carry on their business substantially in a single state in which such holding company and every subsidiary thereof are organized, the Commission may grant an exemption from any provision of the Act 'Unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers.'

The power of the Commission under the 'unless and except' clause of section 3(a) to deny exemption to a predominantly local holding company does not mean, as North American urges, that a holding company having no relation whatever to interstate commerce be subjected to section 11(b)(1) or to any other provision of the Act. The Commission, in denying an exemption under this clause, is bound by the policy set forth in section 1(c) to act so as to eliminate the evils connected with holding companies

'engaged in interstate commerce or in activities which directly affect or burden interstate commerce'. A holding company predominantly local in character may nevertheless engage in activities affecting or burdening interstate commerce to the detriment of the public interest or the interests of investors and consumers. Only in such a case could the Commission properly deny an exemption under the 'unless and except' clause."

The lower Court, herein, in its opinion (R. 259-261) held:

"Foreign Power is a Maine corporation, many of whose securities are held by American investors. It is a subsidiary of Bond and Share, which has registered as a holding company under the Act. Foreign Power does not operate directly or indirectly any public utility within the United States, and its income from utility operations is derived solely from subsidiary companies operating in foreign countries. Because of these facts the petitioner argues that the Public-Utility Holding Company Act of 1935 does not give the Commission jurisdiction to regulate any of Foreign Power's affairs.[4] We cannot agree with this contention. Foreign Power is within the literal definitions of 'holding company' and 'subsidiary company', set forth in sections 2(a)(7) and 2(a)(8) respectively, neither of which contains any geographical limitation. Under section 3(a)(5) the Commission is directed to exempt by rule or order a holding company from any provision or provisions of the Act 'unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors * * * if—(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more companies that are, a company or companies the

principal business of which within the United States is that of a public-utility company."[5] A similar provision for the exemption of a subsidiary company of a holding company is found in section 3(b). The discretion which sections 3(a)(5) and 3(b) confer upon the Commission to consider the public interest and the interest of investors in determining the extent of the exemption to be granted to a company such as Foreign Power would be meaningless, if the definitions of 'holding company', and 'subsidiary' were to be so limited as ipso facto to make the Act inapplicable to such a company. Consequently in our opinion, the Commission had power to rule, as it did in 6 S. E. C. 396, that Foreign Power was entitled to only partial exemption from regulation under the Act. We do not understand the petitioner to argue, nor could he successfully do so, that the partial exemption granted Foreign Power was broad enough to exempt it from the provisions upon which the Commission relied in making the orders now under review."

In interpreting the same provisions of the Act, the lower Court reached a wholly opposite conclusion from that of this Court, and it is respectfully submitted that the lower Court was consequently in error.

In many instances in the past, the Commission in administering section 3(a)(5) of the Act, did not question the fact that companies, such as Foreign Power, were entitled to complete exemptions from the operations of the Act.[4]

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[4] *Matter of American Allied Products Co., et al.,* 1 S. E. C. 876;
Matter of Electric Co. of Costa Rica, 1 S. E. C. 382;
Matter of Engineering Investors Corp., 1 S. E. C. 451;
Matter of South American Utilities Corp., 2 S. E. C. 314;
Matter of Middle West Utilities Co. of Canada Limited, 2 S. E. C. 505.

In *Burco, Inc.* v. *Whitworth,* 81 F. (2d) 721 (cert. denied, 297 U. S. 724), it was held that the Public Utility Holding Act of 1935 was unconstitutional insofar as it sought to apply the registration provisions to a public utility holding company being reorganized under section 77(B) of the Bankruptcy Act, where such company was not engaged in interstate commerce and where its subsidiaries operate wholly intrastate.

The power of Congress to legislate as to commerce within the United States is constitutionally limited to "interstate commerce". Throughout the Act, there appears repeatedly provisions intended to eliminate from the regulations therein, any company whether holding or subsidiary, whose sole interests were "intrastate". Likewise Congress in the Act specifically sought to exempt therefrom any attempt to regulate holding companies and their subsidiaries whose utility operations were confined solely to foreign countries. The interpretation of the Act by the lower Court that exemption of such companies from the regulation thereunder is subject to the discretionary action of the Commission, is not only without any statutory authority, but is obviously contrary to the decision of this Court (*North American Company* v. *Securities and Exchange Commission, supra*).

The only interest evidenced by Congress in the Act with respect to any operation in a foreign country, appears in section 11(b)(1)(B), where in referring to a possible additional integrated public-utility system which a registered holding company might be permitted by the Commission under the Act to continue to control, Congress directed that the Commission must find:

> (B) All of such additional systems are located in one state, or in adjoining states, or in a contiguous foreign country.

The condition referred to in the aforesaid subsection (B) of section 11(b)(1) is not applicable to the instant cases and is not involved herein.

Conclusion

It is most important to investors in the United States whom Congress sought to protect by the Public Utility Holding Company Act of 1935, that the Congressional mandates and limitations specifically provided for in the Act, shall remain inviolate, and that the usurpation of power thereunder by the Commission, deliberately withheld from it by Congress and entrusted by the Act solely to Federal Courts, shall not be withdrawn by erroneous judicial decrees.

It is respectfully submitted that the foregoing petition for writs of certiorari, should be granted.

Respectfully submitted,

SAMUEL OKIN,
Attorney for Petitioner,
No. 32 Broadway,
New York City.

August 10th, 1946.

Appendix A.

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 22nd day of January, A. D. 1944.

IN THE MATTER

of

AMERICAN & FOREIGN POWER COMPANY, INC., ELECTRIC BOND AND SHARE COMPANY,

File No. 70-785

(Public Utility Holding Company Act of 1935.)

ORDER GRANTING APPLICATIONS AND PERMITTING DECLARATIONS TO BECOME EFFECTIVE; AND GRANTING APPLICATION FOR EXEMPTION FROM COMPETITIVE BIDDING.

American & Foreign Power Company, Inc. ("Foreign Power"), a registered holding company and a subsidiary of Electric Bond and Share Company ("Bond and Share"), likewise a registered holding company, and Bond and Share having filed their joint amended applications and declarations under the Public Utility Holding Company Act of 1935, and particularly Sections 6(a), 7, 9(a)(1), 10, 12(b), 12(c) and 12(d) thereof and Rules U-23, U-42, U-44, U-45 and U-50 thereunder, regarding (a) the payment by Foreign Power of $5,000,000

in cash to, and issuance of 3% serial notes of Foreign Power aggregating $30,000,000 principal amount to, Bond and Share in cancellation and redemption of the 7% overdue $35,000,000 note of Foreign Power dated February 14, 1935, held by Bond and Share on which note 6% interest is currently being paid; (b) the sale by Bond and Share, from time to time, exempt from the competitive bidding requirements of Rule U-50, of $3,300,000 aggregate principal amount of bonds of certain indirect public utility subsidiaries as follows:

Arkansas Power & Light Company, First and Refunding Mortgage Gold Bonds, 5% Series, $833,500; Louisiana Power & Light Company, First Mortgage Gold Bonds, 5% Series, $377,000; Minnesota Power & Light Company, First and Refunding Mortgage Gold Bonds, 5% Series, $90,000 and First and Refunding Mortgage Gold Bonds, 4½% Series, $161,000; Mississippi Power & Light Company, First Mortgage Gold Bonds, 5% Series, $399,500; New Orleans Public Service, Inc., First and Refunding Mortgage Gold Bonds, Series A, 5%, $397,000 and First and Refunding Mortgage Gold Bonds, Series B, 5%, $503,000; Pacific Power & Light Company, First Mortgage and Prior Lien Gold Bonds, 5% Series, $285,000; and Texas Electric Service Company, First Mortgage Gold Bonds, 5% Series, $254,000; and (c) the acquisition by Bond and Share of a portion of its outstanding $5 and $6 preferred stocks by purchase in the open market with the $5,000,000 proposed to be paid to it by Foreign Power, together with the proceeds of sale of the aforesaid bonds and the proceeds of the redemption of bonds of indirect subsidiary companies to wit: Florida Power & Light Company, First Mortgage Gold Bonds, 5% Series, $417,000; Utah Power & Light Company, Thirty Year Five Percent Gold Bonds, $300,000 and Mississippi Power & Light Company, First Mortgage Gold Bonds, 5% Series, and $31,500; and

Appendix A.

A public hearing having been held after appropriate notice, and the Commission being fully advised and having this day issued its Findings and Opinion herein;

On the basis of said Findings and Opinion,

IT IS ORDERED that said joint amended application and declarations relating to payment of $5,000,000 cash by, and issue of said serial notes by, Foreign Power to Bond and Share in cancellation and redemption of said $35,000,000 note be, and the same hereby are, respectively granted and permitted to become effective forthwith, subject, however, to the terms and conditions prescribed in Rule U-24, and subject to the further terms and conditions that:

(1) The approval herein contained is subject to the express condition and reservation that the authorization by the Commission of the transactions herein proposed shall in no way serve to affect the rank or status, legal or equitable, of the debt claim of Bond and Share against Foreign Power heretofore represented by the note to be retired and hereafter to be represented by the notes to be issued by Foreign Power to Bond and Share hereunder, or the existing jurisdiction of the Commission with respect to said debt claim, in connection with any future reorganization of Foreign Power or any other matter in which said rank or status would be pertinent;

(2) All agreements, conditions and reservations of jurisdiction heretofore imposed, made or entered into shall continue in effect and shall in no sense be deemed to have been waived, terminated or exercised by the action taken herein or hereunder; and

(3) If final determination of such rank and status and the propriety of payment of such notes has not been made

prior to the date of maturity of any one or more of said notes, no payment shall be made or received on or with respect to the principal of any of said notes at maturity or otherwise, except pursuant to permission of the Commission and until such permission is given, interest on said note proposed to be paid shall not be accrued, paid or charged at a rate in excess of 3% per annum unless the Commission by order shall have permitted a higher rate of interest; and failure to make any such payment of principal prior to permission of the Commission to make such payment shall not serve to accelerate the maturity of any of said notes not otherwise matured by their terms.

IT IS FURTHER ORDERED that the declaration relating to the sale by Bond and Share of the bonds of its indirect subsidiaries, be, and the same hereby is, permitted to become effective, forthwith, subject, to the terms and conditions prescribed in Rule U-24.

IT IS FURTHER ORDERED that the application for exemption of the aforesaid sale of bonds from the competitive bidding requirements of Subsections (b) and (c) of Rule U-50 be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the declaration respecting the acquisition by Bond and Share of a portion of its outstanding $5 and $6 preferred stocks be, and the same hereby is, permitted to become effective forthwith, subject to the terms and conditions prescribed in Rule U-24, and to the further terms and conditions that:

(1) All purchases shall be effected on the New York Curb Exchange except that the Company may purchase large blocks of stock otherwise than on said Exchange

provided that notice of intention to effect each such purchase together with a statement of the identity of the seller, the price proposed to be paid and any fees or commissions to be incurred in connection therewith shall have been given to the Commission and the Company shall not have been informed by the Commission that it intends to issue an order to show cause why such purchase should not be consummated. The Company shall not solicit or cause to be solicited the sale of any shares to the Company either on or off the Exchange;

(2) The Company shall furnish to the Commission promptly at the end of each week a report showing the number of shares of each class of preferred stock purchased each day during the week, the prices at which they were purchased and the names of the brokers through whom they were purchased;

(3) The Company shall include in its quarterly reports to stockholders information as to the total number of each class purchased and the aggregate purchase price for each class;

(4) No purchases shall be made after August 2, 1944, subject, however, to the right of the company to apply for an extension or extensions of such period;

(5) The Commission reserves jurisdiction in its discretion to rescind or modify its order at any time prior to August 2, 1944, or the expiration of any extension or extensions beyond such date, any such rescission or modification to be applicable to such portion of the cash permitted to be employed for such purchases pursuant to the proposals herein as shall not have been previously expended;

(6) The Company shall advise by letter the holders of record of its preferred stock fully with respect to its intention to make purchases with the funds herein permitted to be used for such purchases and the method to be employed, and the Commission reserves jurisdiction with respect to the form and contents of such notice and any similar communications; and

(7) The Commission reserves jurisdiction to require that all shares of preferred stock acquired by the company pursuant to the present declaration and order be retired and cancelled.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(Seal)

Appendix B.

SECURITIES AND EXCHANGE COMMISSION
Philadelphia

Holding Company Act of 1935
Release No. 5757

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 25th day of April, A. D., 1945.

IN THE MATTER *of* AMERICAN & FOREIGN POWER COMPANY, INC., ELECTRIC BOND AND SHARE COMPANY, File No. 70-785 (Public Utility Holding Company Act of 1935.)	ORDER PERMITTING DECLARATION TO BECOME EFFECTIVE PURSUANT TO RULE U-23.

American & Foreign Power Company, Inc. ("Foreign Power"), a registered holding company, and its parent, Electric Bond and Share Company ("Bond and Share"), which is likewise a registered holding company, have filed an amendment in the above entitled matter which is pending under the Public Utility Holding Company Act of 1935 and particularly Section 12(b) and Rule U-45 thereof, regarding the following proposed transactions:

Appendix B.

Foreign Power and Bond and Share have entered into an agreement, subject to the permission of the Commission sought in the present amendment extending to July 22, 1945 the date of maturity of a $3,000,000 3% Serial Note payable January 22, 1945. All other terms and conditions of the said Note are to remain unchanged.

The Commission, on January 22, 1944, issued its Order in the above-entitled matter (Holding Company Act Release No. 4855) among other things permitting the issuance by Foreign Power to Bond and Share of $30,000,000 of 3% Serial Notes consisting of four of such notes in the principal amount of $3,000,000 each, the first of which was payable on January 22, 1945 and the others of which are successively payable annually thereafter, and a fifth note in the amount of $18,000,000 maturing at the end of five years.

The said Order contained a condition prohibiting any payments by Foreign Power to Bond and Share with respect to the principal of any of said 3% Serial Notes at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission.

There is presently pending a Section 11(e) Plan filed by Foreign Power and Bond and Share under which Foreign Power security structure is proposed to be reorganized and all of the securities therein held by Bond and Share are to be surrendered in exchange for new securities of Foreign Power and cash and the discharge of the various claims which have been or might be asserted on behalf of Foreign Power against Bond and Share, including such claims with respect to the rank and status of the 3% Serial Notes, and accordingly the amendment states that no application has been made for permission to pay the $3,000,000 note due January 22, 1945 or to determine its rank and status.

Appendix B.

A Notice of Filing was issued on April 5, 1945 with respect to the amendment, in the form and manner prescribed by Rule U-23 under said Act and a request for a hearing was received by the Commission from one Samuel Okin, holder of nine thousand shares of common stock of Electric Bond and Share Company. Okin had previously participated in this proceeding.

It appears that no new issues of substance (other than the extension of the maturity date of the note due January 22, 1945) not already determined by our Order of January 22, 1944 have been raised by either the amendment or the petition. No other person or persons have requested a hearing.

The Commission having considered said amendment and said petition and deeming a hearing unnecessary to the public interest and the interest of consumers and investors; and the Commission finding that the requirements of the applicable provisions of the Act and the Rules thereunder are satisfied, and deeming it appropriate in the public interest to permit said declaration to become effective:

IT IS HEREBY ORDERED pursuant to Rule U-23 and the applicable provisions of said Act, and subject to the terms and conditions prescribed in Rule U-24, that the aforesaid amendment be, and the same hereby is, permitted to become effective forthwith.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(Seal)

Appendix C.

UNITED STATES OF AMERICA

BEFORE THE SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pennsylvania, on the 17th day of August, A. D., 1945.

IN THE MATTER *of* AMERICAN & FOREIGN POWER COMPANY, INC., ELECTRIC BOND AND SHARE COMPANY, File No. 70-785 (Public Utility Holding Company Act of 1935.)	ORDER PERMITTING DECLARATION TO BECOME EFFECTIVE PURSUANT TO RULE U-23.

American & Foreign Power Company, Inc. ("Foreign Power"), a registered Holding company, and its parent, Electric Bond and Share Company ("Bond and Share"), which is likewise a registered holding company, have filed a declaration in connection with the above entitled matter which is pending under the Public Utility Holding Company Act of 1935 and particularly Section 12(b) thereof and Rule U-45 thereunder regarding the following proposed transaction:

Foreign Power and Bond and Share propose to enter into an agreement for the further extension to January 22, 1946 of the maturity date of the hereinafter mentioned $3,000,000 3% Serial Note of Foreign Power, held

by Bond and Share, which was due originally on January 22, 1945 and was heretofore extended to July 22, 1945. All other terms and conditions of the said note are to remain unchanged.

The Commission, on January 22, 1944, issued its Order in the above-entitled matter (Holding Company Act Release No. 4855) among other things permitting the issuance by Foreign Power to Bond and Share of $30,000,000 of 3% Serial Notes consisting of four of such notes in the principal amount of $3,000,000 each, the first of which was payable on January 22, 1945 and the others of which are successively payable in the three succeeding years, and a note in the amount of $18,000,000 maturing at the end of five years.

The said Order contained a condition prohibiting any payments by Foreign Power to Bond and Share with respect to the principal of any of said 3% Serial Notes at maturity or otherwise prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission.

The Commission, on April 25, 1945, issued its further Order in the above-entitled matter (Holding Company Act Release No. 5757) permitted Foreign Power and Bond and Share to enter into an agreement to extend the maturity of the $3,000,000 Serial Note payable January 22, 1945 to July 22, 1945, all other terms and conditions of said note remaining unchanged, and said agreement was entered into by Foreign Power and Bond and Share pursuant to said Order.

Foreign Power has filed with this Commission under Section 11(e) of the Public Utility Holding Company Act of 1935 a Plan, joined in by Bond and Share, for the reorganization of Foreign Power (File No. 54-111, Hold-

ing Company Act Release No. 5388) and said Plan proposes among other things that the 3% Serial Notes in the principal amount of $30,000,000 together with other securities of Foreign Power held by Bond and Share be surrendered to Foreign Power for the considerations, among others, of the receipt by Bond and Share of cash, debentures and common stock of Foreign Power. Said Plan is pending and this Commission has not given its permission to any payment by Foreign Power or any receipt by Bond and Share with respect to the principal of said serial note due originally on January 22, 1945.

Declarants request that the Commission's Order on the present declaration be entered at as early a date as possible.

The present declaration was filed on the 21st day of July, 1945, a notice of said filing was issued on the 27th day of July, 1945 and notice of said filing was given in the form and manner prescribed by Rule U-23 promulgated to said Act. A request for a hearing was received by the Commission from one Samuel Okin, a holder of 9,000 shares of common stock of Bond and Share. Okin had participated in the original proceeding which eventuated in the issue of said Order of January 22, 1944. No other person or persons have requested a hearing.

It appears that no issues of substance (other than the extension of the maturity date of the note originally on January 22, 1945) not already determined by said Orders of January 22, 1944 and April 25, 1945 have been raised either by the present declaration or by Okin's petition for a hearing.

The Commission having considered said declaration and said petition and deeming a hearing unnecessary to the public interest and the interests of consumers and

investors; and the Commission finding that the requirements of the applicable provisions of the Act and the Rules thereunder are satisfied and deeming it appropriate in the public interest that said declaration be permitted to become effective and that the effective date thereof be advanced;

IT IS HEREBY ORDERED pursuant to said Rule U-23 and the applicable provisions of said Act and subject to the terms and conditions prescribed in Rule U-24, that the aforesaid declaration be, and the same hereby is permitted to become effective forthwith.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(Seal)

Appendix D.

Statutes Involved

The Sections of the Public Utility Holding Company Act of 1935 (U. S. C., title 15) which are pertinent on this application, are as follows:

Section 1. (c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

Section 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

(1) such holding company, and every subsidiary company thereof which is a public-utility company from

which such holding company derives, directly or indirectly, any material part of its income, are predominantly intrastate in character and carry on their business substantially in a single State in which such holding company and every such subsidiary company thereof are organized;

(2) such holding company is predominantly a public-utility company whose operations as such do not extend beyond the State in which it is organized and States contiguous thereto;

(3) such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company and (a) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from any one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company;

(4) such holding company is temporarily a holding company solely by reason of the acquisition of securities for purposes of liquidation or distribution in connection with a bona fide debt previously contracted or in connection with a bona fide arrangement for the underwriting or distribution of securities; or

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company

or companies the principal business of which within the United States is that of a public-utility company.

Section 7. (c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and

are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 11. (b)(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company. The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing,

it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under

the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 12. (c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 18. (f) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discre-

tion, may institute the appropriate criminal proceedings under this title.

Section 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may

modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 25. The District Courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C.,

title 28, secs. 225 and 347), and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

Section 26. (c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this ttile or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

Section 29. Any person who wilfully violates any provision of this title or any rule, regulation, or order thereunder (other than an order of the Commission under subsection (b), (d), (e), or (f) of section 11), or any person who willfully makes any statement or entry in any application, report, document, account, or record filed or

kept or required to be filed or kept under the provisions of this title or any rule, regulation, or order thereunder, knowing such statement or entry to be false or misleading in any material respect, or any person who willfully destroys (except after such time as may be prescribed under any rules or regulations under this title), mutilates, alters, or by any means or device falsifies any account, correspondence, memorandum, book, paper, or other record kept or required to be kept under the provisions of this title or any rule, regulation, or order thereunder, shall upon conviction be fined not more than $10,000 or imprisoned not more than two years, or both, except that in the case of a violation of a provision of subsection (a) or (b) of section 4 by a holding company which is not an individual, the fine imposed upon such holding company shall be a fine not exceeding $200,000; but no person shall be convicted under this section for the violation of any rule, regulation, or order if he proves that he had no knowledge of such rule, regulation, or order.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 391, 392, 393

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission rendered on January 22, 1944 (R. 11–34), have not yet been officially reported but have been published as Holding Company Act Release No. 4855. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 256–65) is reported at 154 F. 2d 27.

JURISDICTION

The orders of the Circuit Court of Appeals with respect to which writs of certiorari are sought were rendered on March 28, 1946 (R. 104–

105, 184–85, 254–55). An order of Mr. Justice Black, dated June 21, 1946, extended to August 12, 1946, the period during which a petition for writs of certiorari might be filed (R. 268), and the petition was filed on August 12, 1946. Service was effected on October 3, 1946. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. § 79 x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Pertinent sections of the Act are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether a public utility holding company, which has been denied such an exemption by an administrative order no longer subject to review, is completely exempted from the provisions of the Holding Company Act solely by virtue of the fact that all its operating subsidiaries are located in foreign countries.

2. Whether an administrative order authorizing the temporary refunding of an inter-corporate debt claim, subject to certain conditions designed to maintain the status quo pending de-

termination or the rank and status of the debt claim in an appropriate administrative proceeding, is an "injunction" beyond the power of the Commission under the Holding Company Act, either because of lack of affirmative authority to issue such an order or because of limitations on the Commission's powers said to be contained in Section 26 (c) of the Act.

STATEMENT

The petitions for writs of certiorari seek review of judgments of the Circuit Court of Appeals affirming three related orders of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. The first order, dated January 22, 1944, is the basic order involved. This order approved and authorized consummation of certain transactions proposed by Electric Bond and Share Company ("Bond and Share"), and its subsidiary, American & Foreign Power Company, Inc. ("Foreign Power"), both registered holding companies, including the issuance of a note by Foreign Power to Bond and Share, subject to conditions proposed by the Commission and accepted by the companies. The second and third orders, dated respectively April 25, 1945, and August 17, 1945, merely extended upon the same terms and conditions the maturity date of a certain note issued pursuant to the first order. Disposition of prior motions relating to the petition for review of the

first order had determined, contrary to the Commission's contention, that petitioner had standing to challenge the order as a "person aggrieved" and that his petition was not required to be dismissed or the order summarily affirmed on the ground of frivolousness. *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385, 392.

Bond and Share is the top holding company in an extensive utility system comprising domestic and foreign properties. Control over the foreign properties is exercised through Foreign Power, a sub-holding company.[1]

Foreign Power is a Maine corporation having securities widely distributed among investors throughout the United States. All of the operations of its operating subsidiaries are located outside the United States. Under Sections 3 (a) (5) and 3 (b) of the Act, the Commission may exempt from some or all of the provisions of the Act companies not deriving any material part of their income from sources within the United States. In a prior administrative proceeding under these subsections the Commission granted Foreign Power an exemption limited to such of its activities as

[1] Bond and Share's control over the domestic properties is exercised through four sub-holding companies three of which are in various stages of dissolution or reorganization under Section 11 of the Act. Dissolution orders against two of these companies are involved in *American Power & Light Company* v. *Securities and Exchange Commission*, and *Electric Power & Light Corporation* v. *Securities and Exchange Commission*, Nos. 4 and 5, Oct. Term, 1946, which were reargued on October 14 and 15, 1946.

the Commission deemed essentially foreign in their nature and effect. *American & Foreign Power Company, Inc.*, 6 S. E. C. 396. Petitioner did not participate in the earlier proceeding, and the Commission's order, entered in 1939, has long ceased to be subject to review. The financial transaction involved in the instant case is not within the scope of the partial exemption granted in 1939, nor does petitioner contend that it is. Rather his argument in this connection, as more fully discussed below, is that the statute does not by its terms, and could not constitutionally, give the Commission jurisdiction in any respect over the affairs of Foreign Power.

Foreign Power is a subsidiary of Bond and Share (within the meaning of Section 2 (a) (8) of the Act) by virtue of Bond and Share's ownership of 40.22% of the voting power of Foreign Power, represented by common stock, as well as various percentages of the different issues of preferred stock of Foreign Power. Until January 22, 1944, Bond and Share also held a $35,000,000 note of Foreign Power, bearing interest at 7%, which had been executed by Foreign Power prior to the passage of the Act. This note had been treated by the parties as overdue after February 15, 1943, and thereafter interest had been paid at the legal rate of 6% (R. 13–14).

The Commission's concern as to whether repayment of this note in its entirety would be consistent with the provisions of the Act was re-

flected as far back as 1941 when, in orders licensing certain payments by Foreign Power to Bond and Share, the Commission reserved jurisdiction "over all aspects of all classes of indebtedness existing * * * between Bond and Share and American Foreign" (R. 19).

On May 18, 1943, the Commission entered an order reconvening hearings in a proceeding under Section 11 (b) (2) of the Act[2] with respect to Bond and Share and Foreign Power, the order declaring that among the issues to be considered at the reconvened hearings were to be (1) whether compliance with the requirements of Section 11 (b) (2) would require "a recapitalization or reorganization" of Foreign Power, and (2) if such recapitalization or reorganization were to be required, "what shall constitute a fair and equitable recognition of the respective claims in and against American & Foreign Power Company, Inc., therein" (R. 19).

[2] Under Section 11 (b) (2) it is the duty of the Commission generally to require registered holding companies and their subsidiaries to take such steps as may be necessary "to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." It may be noted that the dividend arrearages on Foreign Power's preferred stocks, as of June 30, 1943, totaled some $288,000,000, and that voting control was exercised by the common stock which was some $200,000,000 under water (R. 14–15). Since 1943 dividend arrearages on the preferred stocks have mounted.

Thereafter, during the pendency of this administrative proceeding, Foreign Power submitted to the Commission a proposal for repayment of the $35,000,000 note in full, through the use of $5,000,000 of cash on hand and $30,000,000 to be borrowed from unaffiliated banks at interest not to exceed 3%. However, in view of extensive and complex problems relating to the rank and status of the debt claim,[3] which had not only been raised in the earlier Commission proceeding under Section 11 (b) (2) but were also involved in stockholders' suits brought in state courts on behalf of Foreign Power (R. 20), the management of Foreign Power submitted a stopgap proposal to the Commission in which it was joined by Bond and Share. The new application, which was designed to resolve the matter pending final determination with respect to the rank and status of the debt claim, provided for payment of $5,000,000 in cash and the refunding of the $30,000,000 balance through the issuance of five new 3% notes to Bond and Share, the first four notes in the amount of $3,000,000 each (the first being payable January 22, 1945, the others annually thereafter), and the fifth note in the principal amount of $18,000,000 maturing at the end of five years (R. 16–18).

[3] *Cf. Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (the "Deep Rock" case); *Pepper* v. *Litton*, 308 U. S. 295.

Samuel Okin, owner of 9,000 shares of the common stock of Bond and Share out of a total of 5,250,357.66 of such shares outstanding, was granted a privilege of limited participation at the hearing, at which time he opposed the amended proposals of Foreign Power and Bond and Share (R. 21–22).

On January 22, 1944, the Commission issued its order approving the amended proposal (R. 35–40), and the transactions proposed were consummated on the same day. The said order contained several conditions, one of them being a reservation of jurisdiction in the Commission with respect to determining the rank and status of the debt claim. To make that reservation effective, another condition in the order prohibited any payments by Foreign Power to Bond and Share on the principal of any of the aforementioned 3% serial notes, at maturity or otherwise, prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission. The latter condition, which was also incorporated into the other two administrative orders complained of, is the only part of the Commission's action of which petitioner complains.

Subsequently, Foreign Power and Bond and Share jointly filed with the Commission a plan for the reorganization of Foreign Power under Section 11 (e) of the Act, which permits companies to submit voluntary plans for compliance

with the provisions of Section 11 (b). The plan proposes, among other things, that the 3% serial notes in the principal amount of $30,000,000, together with other securities held by Bond and Share, be surrendered to Foreign Power for the consideration, among other things, of the receipt by Bond and Share of cash, debentures, and common stock of Foreign Power. The proceeding on the Section 11 (e) plan was consolidated with the earlier proceeding under Section 11 (b) (2).[4] Hearings in the consolidated proceedings were begun on December 12, 1944, and are still in progress. The Commission has not yet given its permission to any payment by Foreign Power or any receipt by Bond and Share on the principal of any of the serial notes.

On April 25, 1945, the Commission entered the second order complained of, permitting to become effective a declaration of Foreign Power and Bond and Share which extended the maturity date of the first serial note from January 22, 1945, to July 22, 1945 (R. 122–24). The third order complained of was entered August 17, 1945, further extending the maturity date of this note to January 22, 1946 (R. 208–11). Both orders, in effect, incorporated by reference the conditions contained in the earlier order.

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[4] *American & Foreign Power Company, Inc., et al.*, Holding Company Act Release No. 5388. Copies of this release are being filed with the clerk.

Prior to the decision of this Court on Okin's standing as a "person aggrieved" under Section 24 (a), the Commission had filed with the Circuit Court of Appeals, in support of its motion for dismissal or summary affirmance, so much of the administrative record as it thought necessary for disposition of the motion. The record so filed consisted in principal part of the applications of the companies, the transcript of oral testimony, and the findings and opinion and order of the Commission. Subsequently, in its opinion on Okin's standing as a "person aggrieved", this Court made it clear that—

> The court below has discretion to deal with the problem of the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm on the ground that the petition for review is frivolous (325 U. S. at 392–393).

Thereafter, in the proceeding involving the basic administrative order of January 22, 1944, the Commission renewed its motion in the Court below for dismissal of the petition for review or summary affirmance of the order complained of, upon the basis of the record already on file with the Court. Okin made a cross motion to require filing of the balance of the administrative record. Both motions were denied. The proceeding was heard in the ordinary course upon the record already on file, and the Commission's order was affirmed. At the same time the Court affirmed

the Commission's extension orders, dated April 25, 1945, and August 17, 1945, upon records the sufficiency of which was not challenged.

Upon the present petition for writs of certiorari, Okin does not complain of the action of the Court below in affirming the Commission's order of January 22, 1944, upon something less than the entire administrative record, so we do not understand that question to be in issue.[5] Also not in issue, as we understand the petition, are certain allegations contained in the petition, but not specifically complained of in the court below or in the specifications of error urged in the petition (see Pet. 16–18), with respect to Commission "duress" against officers of the companies and procedural irregularities with respect to the extension orders.

ARGUMENT

The specifications of error urged by petitioner involve issues upon which the lower federal courts have been unanimous in upholding the Commission, or which have never been the subject of litigation, perhaps because the statute, as we shall show, is clear on its face in respect of the matters complained of.

It should be emphasized, moreover, that petitioner's position essentially is to deny to the man-

[5] It may be noted that the stipulation for the printing of the record in the instant proceeding omits a considerable portion of even the abbreviated record filed in the Circuit Court of Appeals (R. 266–67).

agement of the companies and to the Commission the right to maintain the status quo pending resolution of the controversy as to the indebtedness in question. *Cf. Continental Ill. National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. R.*, 294 U. S. 648. In seeking to invalidate the condition (accepted by the companies) which prohibits payment of the principal amount of the notes except upon permission by the Commission, petitioner prematurely seeks to accomplish by indirection what he could not do directly, i. e., foreclose to the Commission and to any court later presented with the case the right to examine the debt claim vis-a-vis other publicly held claims, and to determine whether subordination is necessary in conformity with the "Deep Rock" principle.

Petitioner's justification for this course is, in part, an argument that the Commission does not under the Act, and cannot, as a matter of constitutional law, have jurisdiction in any respect over Foreign Power because all its operating subsidiaries are located abroad. We turn first to this aspect of the petition.

1. This issue has not been before the courts. The management of the Bond and Share system, which has never meekly accepted the regulatory provisions of the Act,[6] has apparently been satis-

[6] That management has twice brought to this Court appeals in which it challenged the constitutionality of the Act. *Elec-*

fied with the partial exemption granted to Foreign Power in 1939. We think the reason is clear on the face of the statute.

The Act defines "holding company" and "subsidiary" in functional terms, without reference to geographical location,[7] and flatly subjects companies within these definitions to the various regulatory provisions thereof.[8] Section 3 (a) of the Act provides in pertinent part:

> The Commission * * * shall exempt any holding company * * * from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—
>
> * * * * *
>
> (5) Such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company

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tric Bond and Share Company v. *Securities and Exchange Commission*, 303 U. S. 419. Also see cases cited at note 1, *supra*. Compare *American Gas & Electric Company*, 9 S. E. C. 247, in which one of the five principal sub-holding companies in the Bond and Share system unsuccessfully sought a declaration that it was not a subsidiary of Bond and Share.

[7] Section 2 (a) (7), (8).

[8] Section 5 (a) requires every "holding company" to register, and the act of registration brings the regulatory system into effect with respect to such holding company and its "subsidiaries." Petitioner does not contend that Foreign Power (which has registered) is not a holding company within the meaning of Section 2 (a) (7) or a subsidiary of Bond and Share within the meaning of Section 2 (a) (8).

> or companies the principal business of which within the United States is that of a public-utility business.

Section 3 (b) authorizes a similar exemption "from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if" its interests are foreign in character.

The manifest purpose of these provisions is to protect American investors and the public interest while at the same time, as stated by the Commission in the 1939 Foreign Power exemption proceeding, to leave "companies operating in foreign countries * * * largely * * * free from the jurisdiction of this Commission with respect to such of their activities as are essentially foreign in their nature and effect." *American & Foreign Power Company, Inc.*, 6 S. E. C. 396, 403. Petitioner does not contend that the partial exemption granted to Foreign Power in that case embraces the type of financial transaction involved in the instant case. His argument is that there is nothing in the Act which gives the Commission jurisdiction over a domestic holding company having foreign subsidiaries—a contention which ignores the express language of the statute. He further contends that he is not concluded by the failure of Foreign Power, Bond and Share, or any of the security

holders, including himself, to file a timely petition for review of the 1939 order.

As to petitioner's point, not raised below, that Congress could not constitutionally exercise jurisdiction over such a company, no one has ever disputed the fact, least of all the petitioner, that the securities of Foreign Power are widely held by investors throughout the United States or that the company employs the mails and instrumentalities of interstate commerce in pursuance of its business as a holding company. Finding, as it did, that investors in many states were suffering as a result of abuses in the public utility holding company field,[9] Congress clearly had the power to protect such investors through its controls over use of the mails and instrumentalities of interstate commerce.[10]

2. The only respect in which petitioner specifically complains of the administrative orders in issue is that in each of them the Commission's

[9] See, *e. g.*, Sec. 1 (a) (1), 1 (b) (1), and 1 (c).

[10] Okin states that in early administrative proceedings the Commission did not question the right of holding companies owning only foreign subsidiaries to a complete exemption from the provisions of the Act (Pet. 42). Actually, the proceedings cited did not involve complete exemptions. See particularly *Middle West Utilities Company of Canada Limited*, 2 S. E. C. 505. Even if they did, the authority for partial exemptions is clear on the face of the statute. Section 3 (a), which is quoted at pp. 13–14, *supra*, provides that administrative exemptions may extend to "any provision or provisions of this title." Section 3 (b) conditions exemption from "any provision" upon public interest findings by the Commission.

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approval of the transaction proposed by the companies is subject to the condition that the principal amount of the notes should not be paid without application to and permission by the Commission. Petitioner states that these conditions are in effect "injunctions" for which there is no warrant in the Act. Under specific statutory provisions referred to below, violation of Commission orders is declared to be unlawful, and subject to penal sanctions (see Sec. 29). Orders carrying penal sanctions are, of course, very much like injunctions with the difference that violation does not constitute contempt as such. Apparently petitioner's contention is that the issuance of any order under the Holding Company Act compelling or prohibiting action is a usurpation of judicial power, regardless of statutory authority therefor. This issue has not previously been litigated, although similar conditions are commonly imposed by the Commission. Again, it is submitted that the statute is clear on its face.

Foreign Power's proposal to issue notes, whether (as originally proposed) to commercial banks or (by amendment) to Bond and Share, was subject to the requirement of Commission authorization under Sections 6 and 7 of the Act. Under these provisions it was the duty of the Commission to deny effectiveness to the proposal if it found, *inter alia*, that—

> the terms and conditions of the issue or sale of the security are detrimental to the

> public interest or the interest of investors or consumers. (Section 7 (d) (6).)

Section 7 (f) provides as follows:

> Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

These provisions are in themselves broad enough to have authorized the Commission in permitting the issuance of the new notes to impose conditions designed to preserve the status quo pending ultimate resolution of the controversy over the rank and status of the Bond and Share debt claim.

In addition, Section 12 gives the Commission broad powers to deal with inter-company payments. Thus Section 12 (c) makes it unlawful for any registered holding company or any subsidiary thereof to retire securities in contravention of Commission rules or orders deemed "necessary or appropriate to protect the financial integrity of companies in holding-company systems * * * or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder." And Section 12 (f) is broadly applicable to authorize the Commission by rule or order to restrain "any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system" if the Commission deems such re-

straint necessary or appropriate for the protection of investors "or to prevent the circumvention" of the Act.

The Senate Banking and Currency Committee said that through Section 12 and Section 13 (the latter dealing with service and construction contracts) "complete regulation of intercompany transactions is provided to prevent the milking of operating companies in the interest of the controlling holding-company groups."[11] Of Section 12 (f) in particular the Committee said that "it embraces all transactions not otherwise unlawful under title I."[12]

The ultimate goal of the pending administrative proceedings relating to Foreign Power is to bring about compliance by Foreign Power with the corporate simplification provisions of Section 11 (b) (2) of the Act and to determine whether plans to accomplish such compliance are "fair and equitable" in accordance with the standards of Sections 11 (e) or 11 (d). As previously stated, the Commission has before it a Section 11 (e) plan filed by Foreign Power and Bond and Share. One of the major issues presented in the proceeding is the equitable status of the Bond and

[11] S. Rep. No. 621, 74th Cong., 1st Sess., 34.

[12] *Id.*, 35. The Committee also said of the cognate provisions of Section 12 (d), which, like Sections 12 (c) and (f), authorizes the Commission "to prevent the circumvention of the provisions of this title," that they were "essential to prevent piecemeal evasion of the reorganization safeguards set up in section 11." *Id.*, 35.

Share debt claim. In entering the orders under review, the Commission found the conditions objected to by petitioner necessary to preserve the status quo until this issue could be determined. If, as petitioner contends, the Commission were powerless to impose such conditions, there would be danger of circumvention of the fair and equitable standard.[13]

3. Petitioner's construction of Section 26 (c) [14] is one which has been uniformly rejected by the lower courts, as more fully discussed, *infra*.

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[13] See note 12, *supra*. We have discussed only a few of the sections of the Act relied on by the Commission as the basis for the orders under review.

[14] Section 26 (c) provides as follows:

"(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien."

Initially it may be noted that the construction of Section 26 (c) is not even involved in this case, for, as observed by the court below (R. 264):

> Even under the petitioner's interpretation we fail to see how the orders on review would conflict with section 26 (c) for they do not pass upon the validity of the original loan nor subordinate its collection to the rights of other security holders of Foreign Power. They merely postpone maturity of the renewal notes until those questions shall have been decided in another proceeding. What that decision will be is as yet unknown.

Petitioner's argument is that Section 26 (c) operates as a limitation upon the Commission's function of effectuating "fair and equitable" reorganizations of holding company systems under Section 11. "If this view be sound", as Judge Leahy stated with respect to a similar contention involving the subsection, "it would seem that Congress has unwittingly nullified its own purpose in creating the Act in the first place." [15]

Petitioner's argument, apart from a misreading of Section 26 (c) itself, reads the subsection out of context. The entire section, of which subparagraph (c) is a part, relates, as its title suggests, to "Validity of Contracts." It deals broadly with contracts in conflict with the Act (or rules or orders thereunder). Subparagraph

[15] *In re American Gas & Power Co.*, 55 F. Supp. 756, 759–60 (D. Del).

(a) deals with contracts to waive compliance, which are declared void. Subparagraph (b) deals with contracts in violation of the Act, or contracts which may have been entered into prior to the Act, as well as thereafter, the performance of which may involve a violation. Such contracts are declared void except as concerns the rights of innocent persons. Subsection (c) merely restates in affirmative language the qualification in subsection (b) safeguarding the rights of innocent persons, giving it a scope already implicit in subsection (b) itself. Certainly there was nothing in the manner of its introduction into the Act to indicate an intent by Congress that it should override the affirmative regulatory powers elsewhere conferred upon the Commission.[16]

But even if the widest possible construction were given to Section 26 (c), it is difficult to see how it would have any application to the present case since neither the Commission's order nor the conditions disputed by petitioner are premised upon an otherwise valid contract being rendered invalid

[16] Section 26 as contained in the early Holding Company bills contained the existing subsections (a) and (b), but not subsection (c). After passage by the Senate in that form (S. 2796, 74th Cong., 1st Sess.), the bill's sponsor in the House proposed, as a committee amendment, that subsection (c) be appended to Section 26. He offered no explanation of the amendment, and it was agreed to without comment from anyone (79 Cong. Rec. 10567). The Conference Committee retained the subsection without change and without even mentioning it in the Conference Report (H. Rep. No. 1903, 74th Cong., 1st Sess.).

by reason of the Act or upon using the Act as a defense to the collection of a debt by any person having acquired the same without knowledge "of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt." Even if subsection (c) were intended to serve some broader purpose than merely to qualify the invalidity of contracts referred to in the earlier subsections, it obviously was not intended to prevent the Commission from either restraining the enforcement of invalid or inequitable intercompany claims, or from exercising the reorganization powers conferred by Sections 11 (c) and (d), under which the holder of a valid debt claim against a solvent company may be required to accept as an equitable equivalent satisfaction otherwise than in accordance with the letter of his bond, and under which the Commission in determining whether a plan is fair and equitable must give weight so far as relevant in the context of the Act to the same type of equitable considerations which have been applied by the courts.[17]

Petitioner cites no authorities in support of his interpretation and we know of none. The courts have uniformly rejected similar contentions. See *In re United Gas Corporation*, 58 F. Supp. 501,

[17] See *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307.

514 (D. Del.) (a Section 11 (e) reorganization in which a Bond and Share debt claim against a subsidiary was compromised after the Commission had taken the view that it should not fairly and equitably be paid in full); *In re American Gas and Power Company,* 55 F. Supp. 756 (D. Del.) (in which the modification of a debenture agreement as an incident to a fair and equitable plan was upheld against the contention of the debenture trustee that it resulted in a dilution of the lien provided for in the debenture agreement); *In re Laclede Gas Light Company,* 57 F. Supp. 997, 1008–1010 (E. D. Mo., 1944), *affirmed, sub nom. Massachusetts Mutual Life Insurance Company* v. *Securities and Exchange Commission,* 151 F. 2d 424 (C. C. A. 8), certiorari denied, March 25, 1946, No. 802, Oct. Term, 1945 (involving the retirement of bonds without a premium as an incident to a fair and equitable plan, notwithstanding the presence of a premium provision in the contract). *Cf. In re Standard Gas and Electric Company,* 151 F. 2d 326 (C. C. A. 3), upholding the power of the Commission to approve a plan satisfying bond owners' claims through an allocation of portfolio assets consisting largely of common stocks of subsidiaries.

CONCLUSION

The decision of the Court below is clearly correct, and no questions are presented which war-

rant consideration by this Court. The petition for writs of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1946.

APPENDIX

Pertinent sections of the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U. S. C. 79, *et seq.*, follow:

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; * * *

* * * * *

(8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; * * *

* * * * *

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

* * * * *

(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

* * * * *

SEC. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for

any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * * * *

SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. * * *

* * * * *

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become

effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

* * * * *

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to

the public interest or the interest of investors or consumers.

* * * * *

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

* * * * *

SEC. 11. (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *

* * * * *

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee,

to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

SEC. 12. (c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(d) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circum-

vention of the provisions of this title or the rules, regulations, or orders thereunder.

* * * * *

(f) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon

any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation.

or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

NOS. 391, 392 AND 393

SAMUEL OKIN,

Petitioner,

against

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Brief of Electric Bond and Share Company in Opposition to Petition for Writs of Certiorari to the United States Circuit Court of Appeals for tne Second Circuit

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JOHN F. MACLANE,
Counsel for Electric Bond and Share Company.

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We accept as adequate for present purposes the statement of the case and of the questions presented as set forth in the brief of the Securities and Exchange Commission (Commission), the respondent herein. This brief is filed in order that this Court may be informed that Electric Bond and Share Company (Bond and Share,) whose interests are directly involved in this matter, opposes the granting of the writs requested by the petitioner.

That Section 26(c) of the Public Utility Holding Company Act of 1935 (Act) prohibits the invalidation of any otherwise valid debt created before the passage of the Act is a proposition advanced by petitioner to which we

most heartily subscribe and which we regard as the plain intent of the section. Bond and Share has consistently taken and adheres to the position that the debts funded by the notes involved in the orders of the Commission in question here were valid when made and are thus within the purview of Section 26. We must recognize, however, that the Commission has posed questions as to the validity, or position in any reorganization of American & Foreign Power Company Inc. (Foreign Power), of this debt and has insisted upon a determination of those questions before any payment of the debt is permitted.

As a solution not only of these specific questions but of the general problems created by the requirements of Section 11 of the Public Utility Holding Company Act of 1935 concerning the structure of holding companies and holding company systems, Bond and Share and Foreign Power have filed with the Commission a Plan of Reorganization of Foreign Power under Section 11(e) of the Act, pursuant to which Bond and Share proposes to surrender its entire interest in Foreign Power, including the notes in question here, in exchange for cash, debentures and common stock of a recapitalized Foreign Power.

Consequently, it seems to us that the sole question here involved is whether Section 11(b) of the Act, relating to the reorganization of holding companies and holding company systems, authorizes the Commission to inquire into the status of debt claims involved in any such reorganizations and into the fairness and equitableness of their solution in the proposed reorganization. If Section 11(b) has any meaning, this question can be answered only in the affirmative, and the procedure adopted by the Commission here maintains the status quo while at the same

time has allowed Foreign Power to refund a debt claim upon favorable terms.

Petitioner's entire argument concerning the application of Section 26(c) is based on the assumption that the debt owed by Foreign Power to Bond and Share is valid. While we think that his assumption is entirely correct, it is the very question which is awaiting solution by the compromise method proposed in the 11(e) Plan, and is not and cannot be presented here for determination or even used as a basis for decision.

Respectfully submitted,

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